

Shared Parenting as an Interpretation of the Best Interests of the Child in Custody Disputes: What Malaysia May Learn from Australian Experience

by

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Abstract

In most western countries there is now a consensus that shared parenting is the best alternative for children when their parents separate or divorce. Maintaining a relationship with both parents after divorce, by way of a shared parenting arrangement is said to be the best alternative to merely providing for contact among children and non-resident parents by way of a sole custody arrangement. Such an arrangement would minimise conflict between warring parents and maintain a healthy level of adjustment for the children, therefore diminishing the detrimental effects of parental conflict on children. The best interest of the child would be preserved as the child is able to retain a strong connection with both parents despite of parental break-up. The basis of this concept can be found in the United Nation Convention on Right of Child 1989, which clearly emphasized on the importance of both parents to be equally responsible for the upbringing of their children. This paper seeks to examine the extent of the laws and the judicial decisions in Malaysia in upholding shared parenting as the best interest of the child in custody disputes after parental divorce. In doing so, it attempts to provide an overview of the current law and the approach of the courts in granting custody orders. The paper will also highlight the problems of implementing shared parenting arrangement, particularly in cases involving determination of the religion of the child and domestic violence. As a comparison, it also seeks to examine the Australian legislation on custody disputes which has undergone a tremendous shift from sole custody standard to shared parental responsibility. The purpose is to learn from the Australian experience in advocating shared parenting as the primary custody standard for the best interest of the child in custody disputes and whether Malaysia may adopt a similar legislative amendment.

1.0 Introduction

In recent years, the principle of best interest of the child has been the prevailing standard of custody legislations of various nations in the world. The tremendous shift from parental rights to parental responsibilities throughout the centuries had made the principle as the utmost matter which parents must uphold in child upbringing. Despite the commitment to this principle is significantly enshrined in the United Nation Convention on Rights of the Child ¹(hereinafter referred to as UNCRC), the content and application of the principle differs across borders. Differences persist notwithstanding many countries have experienced a substantial shift over the last several decades in the types of custodial arrangements that are thought to best serve children's interests. One of the types of arrangements that are perceived to be best for the interest of the child is shared parenting. Shared parenting is a concept that, following divorce or separation, mothers and fathers should retain a strong positive parenting role in their children's lives, and it includes arrangements where children spend significant amounts of their time living at the home of both parents.² The concept assumes that both parents have major involvement in the child's physical care and some form of sharing in the major decision making.³ Sometimes this arrangement is called joint physical custody⁴, joint legal custody⁵, time sharing, shared residence or shared parenting. The basis of this concept can be found in the UNCRC which clearly emphasized the importance of both parents to be equally responsible for the upbringing of their children.⁶ The language of shared parenting has been incorporated in very different ways into the laws of a number of jurisdictions. Some of these jurisdictions have done so in a way that appears to closely resemble a presumption which favours joint legal and physical custody, while others formulated it in a way closer to shared parental responsibility.

2.0 Shared Parenting as the Primary Standard of the Child's Best Interest Principle

There are various reasons which contribute to the increasing interest in shared parenting as the preferred standard for child custody in some jurisdictions. One of the main reasons is that there is a growing awareness of the effect of divorce on children. Research has shown that children of divorce tend to suffer from behavioral and emotional problems due to the experience of a significant loss of a parent after the divorce.⁷ It was also reported that right of access or

¹ Article 3 of the United Nation Convention on Rights of the Child.

² Arthur Baker & Peter Townsend, "Post-Divorce parenting – Rethinking Shared Residence", Vol. 8, No. 3, (1996) *CFLQ*, at 217.

³ Heather Hayes & Graham Hunt, "Are Shared Custody Arrangements made in the Best interests of the Child?", paper presented at the *Second Family Court of Australia National Conference, Enhancing Access to Justice*, 20 – 23 September 1995, 20-23 September, Sydney, New South Wales Australia, p. 31-42, at 31.

⁴ An arrangement that involves sharing of day to day care of the child. See Jay Folberg, "Custody Overview" in *Joint Custody & Shared Parenting*, Jay Folberg (ed.), The Bureau of National Affairs & Association of Family and Conciliation Courts, USA, 1984, at 7.

⁵ An arrangement in which both parents have equal rights and responsibilities regarding major decisions and neither their rights are superior. See Jay Folberg, *ibid*.

⁶ Article 18 of the UNCRC provides that the Convention states shall do their best to secure the recognition of the principle that both parents have joint responsibility for the upbringing and development of the child.

⁷ Numerous studies have been conducted on this matter. See for example, Wallerstein J.S. & Joan B. Kelly, "The Effect of Parental Divorce: Experience of the Child in Later Latency", Vol. 46, (1976) *American Journal of Orthopsychiatry*, 256; Healy, J. Malley J. & Steward A, "Children and Their Father After Parental Separation", Vol.

contact which is given to the non-resident parent is insufficient to avert the above problems.⁸ The proponents of shared parenting maintain that the child of divorce is protected from loss of a significant attachment figure, has continued contact with both parents and the relationship are more realistic i.e. requiring participation from both parents and a more equal balance of responsibility.⁹ It was also argued that shared parenting affirms the concept that parents are forever. It means that despite the legal relationship between the parents has ended, their roles and responsibilities as parents continue.¹⁰ These evidences have led to the conclusion that shared parenting is the best custodial standard particularly for the psychological interest of the child and for a revival of interest in the position of a non-resident parent.¹¹ Another reason is the current changes in parenting roles in which it is no longer based on gender identity as both parents are increasingly involved in raising their children, though their children are often spending more time in the care of others. This development has led to the emergence of the father's movement in pressuring the changes from traditional standard of awarding sole custody to the mother to joint custody or shared parenting.¹²

3.0 The Laws in Malaysia

In Malaysia, the laws which govern the guardianship and custody of children are the Guardianship of Infant Act 1961 (hereinafter referred to as GIA 1976), the Law Reform (Marriage & Divorce) Act 1976 (hereinafter referred to as LRA 1976) and the Islamic Family Law Enactments of the States.¹³ These laws have placed welfare or best interests of the child principle as the central theme of child custody arrangements¹⁴ but generally retain the traditional pattern of granting a sole custody order in which the parent who is considered better and fit in the upbringing of the child will be awarded with the custody of the child. The laws are silent on the concept of equal shared parenting or shared parental responsibility. Nonetheless, in 1998, an amendment was made to the GIA 1961¹⁵ to include a provision which stipulates equal parental rights to child's custody, upbringing, and administration of its property. The inclusion of the provision has raised a question as to whether it could be interpreted as promoting an equal shared

60, No. 4, (1990) *American Journal of Orthopsychiatry*, 430-433; Lund, "Research on Divorce and Children", [1984] *Fam. Law*, 198.

⁸ Arthur Baker & Peter Townsend, n. 2, at 218.

⁹ Pesikoff, R. B. & Pesikoff B.S., "Child Custody in the 80s: The Effect of Divorce on Childhood and Teenagers and the Concept of Joint Custody", vol. 23, no. 1, (1985) *Conciliation & Courts Review*, 53-55. See also Wallerstein J.S. & Joan B. Kelly, n. 7, at 256.

¹⁰ Meyer Elkin, "Joint Custody: In the Best interests of the Family, Joint Custody & Shared Parenting" in *Joint Custody & Shared Parenting*, Jay Folberg (ed.), n. 4, at 12. . See also Miriam Galper, *Joint Custody & Co-Parenting: Sharing Your Child Equally*, Philadelphia, PA., Running Press 1978 (revised 1980), at 88.

¹¹ Arthur Baker & Peter Townsend, n. 2, at 218.

¹² Ibid. See also Jay Folberg, n. 4, at 3; Kristi Kurki-Suonio, "Joint Custody As An Interpretation of the Best interests of the Child in Critical and Comparative Perspective", vol. 14, (2000) *IJLP&F*, at 183.

¹³ Family matters in Malaysia are governed by two different sets of laws, laws for the non-Muslims and laws for Muslims. GIA 1976 and LRA 1976 are laws which are applicable to the non-Muslims while for the Muslims, they are governed by the States's family law enactments. The difference in the applicability of the laws is due to the diversity in the component of the population in Malaysia. For further details, see Ahmad Ibrahim, *Family Law in Malaysia*, Third Edition, Malayan Law Journal Sdn. Bhd., 1997, pp. 1-11 and Mimi Kamariah Majid, *Malayan Law Journal Sdn. Bhd.* 1999, pp. 2-6.

¹⁴ See Section 11 of GIA 1961, section 88(2) of LRA 1976 and section 86(2) of IFLA 1984.

¹⁵ Section 5 GIA 1961.

parenting between the parents. Decisions of the civil courts seem to construe the provision as promoting the concept of shared parental rights rather than equal shared parenting or shared parental responsibility. For instance, in *Gan Koo Kea v Gan Shiow Lih*,¹⁶ the court construed this provision of the GIA 1961 to mean only the rights of the parents to the guardianship of children, and that the physical custody, care and control is governed by the provision of the LRA 1976. In this case, the court held that the father is eminently unsuitable for the guardianship of his children since he failed to attend the children after separation. The guardianship was therefore given to the mother. Similarly, in *Jennifer Patricia Thomas v Calvin Martin Victoria David*,¹⁷ the court considered the above provision of the GIA 1961 to mean the parental rights to joint guardianship. The court granted joint guardianship to both parents but the daily custody, care and control of the children remained with the mother.¹⁸ Thus, it is reasonable to conclude that the provision only establishes equal parental rights and responsibility in guardianship matters and not equal shared parenting in the physical custody, day to day cares and control of the child.

As for the Muslims children, the governing law i.e. IFLA 1984, is similarly silent on any specific provision which provide for shared parenting. The law as in the civil legislation retains the traditional pattern of granting a sole custody order in which mother is assumed to be the best person entitled to the custody of her child, particularly if the child is still at the infancy stage.¹⁹ For instance, in *Mohamed Salleh v Azizah*²⁰ the custody of four children aged between four years and thirty nine days was given to the mother on the grounds that the children were still young and needed the attention and care of the mother and there was no valid reason to deprive of their custody. Preference for sole custody order is also prevalent in cases involving changes of place of living of the child. The changes would usually bring adverse effect to the well being of the child. As was decided in the case of *Hasanah Bt Abdullah v Ali bin Muda*,²¹ the child's well being will be affected if his or her place of residence is frequently change. The court ordered the parental agreement on contact to be varied and reduced the amount of contact with the father in order to safeguard the interest of the child.

It has been argued that the provision of GIA 1961 on equal parental rights should be equally applies to Muslims children since there is another provision in the GIA 1961 which allows application of the provisions of the Act to Muslims subject to a condition that the provisions must be adopted by the State Legislature of every states in Malaysia.²² However, such adoption by the State Legislatures is no longer available since the recent Islamic Family law Enactments of all states of Malaysia do not make any provision for the adoption.²³

¹⁶ [2003] 4 CLJ 545.

¹⁷ [2005] 7 CLJ 133.

¹⁸ See section 5 of GIA 1961.

¹⁹ See section 81(1) IFLA 1984

²⁰ [1984] 4 jh 212

²¹ (1999) 2 JH

²² See section 1(3) of GIA 1961

²³ After 1988, all states Family Law Enactments have deleted the provision which provide for the adoption of GIA's provisions. For detail discussions on the application of section 5 of GIA 1961 to Muslims, see for example the judgement of *Subashini Rajasingam v. Saravanan Thangathoray & Other Appeals* [2008] 2 CLJ 1

4.0 The Practice of the Courts in Malaysia

Despite the absence of a specific provision on equal shared parenting in physical custody, cares and control of the child or equal shared parental responsibility in the Malaysian legislations, the Civil and Shariah courts in Malaysia in many cases have always exercised its discretion in making such order if it is in the best interests of the child. For instance, in *Foo Kok Soon v Leony Rosalina*,²⁴ the court initially ordered joint custody, care and control of the two children but later changed with the consent of both parents; where the custody, care and control were given to the father and unlimited access to the mother. The reasons for such variation were because the father refused to comply with the order that requires the children to be registered in a school in Perth Australia, the place where the mother resided and the parents live separately in two different countries. The decision of the court proves that shared physical custody or parenting is not appropriate in cases where the parents are living separately in two different countries.

While in *Karen Cheong Yuen Yee v Phua Cheng Chuen*,²⁵ the court allowed the application of the father for joint custody of his three children in order for him to be actively engage in decision making process that involved the children's education, health and other matters related to their upbringing. In this case, the court viewed joint custody as appropriate since both parents lived closely with each other and there is no proven evidence of violence, harassment or cruelty inflicted by the father on the mother. Thus, both parents have equal rights to have the daily care, control and responsibility to make decision about the future upbringing of the children.

The Syariah Courts may exercise its discretion to depart from this traditional pattern as Islamic law highly emphasized on the general responsibility of both parents in the child's upbringing based on the principle that parents are forever together in handling childcare despite separation or divorce.²⁶ In general, Islamic law imposes the responsibility of the father as the primary natural guardian of the minor. Thus, in the event of divorce and the custody of the child is given to the mother, the responsibility of the father, being a guardian (Wali) continues until the child attain the age of puberty or married in the case of a girl.²⁷ As guardian, he is responsible for his child's maintenance, education and overall upbringing. In addition, the custodian mother and the child are expected to stay nearer to the non-custodian father so as he has an easy access to supervise the child. The right of access is again to ensure the equal responsibility of the parents towards the child when they mutually agree on the access arrangement and thus, the best interest of the child will always be preserved.

²⁴ [1998] 4 CLJ Supp. 289.

²⁵ [2004] 7 CLJ 102.

²⁶ Najibah Mohd Zin, How the Best interests of the Child is Best Served in Islamic Law With Special Reference to its Application in the Malaysian Shariah Court, , vol. 9, No. 1 (2005) *IKIM LJ*, at 338.

²⁷ Ibid

In *Mohamed Radhi v Khadijah*,²⁸ the court cautioned both parents to always maintain harmonious relationship after the divorce especially between parent and the child. In this case, the court gave the plaintiff the liberty to arrange amicably the visitation rights between his two sons and their mother. Similar line of judgement were held in *Zawiyah v Ruslan*,²⁹ *Azura binti Adna v Mohd Zulkefli bin Saleh*,³⁰ *Faridah binti Daud & Anor v Mohd Firdaud Abdullah @ Jettle Francis*³¹ and *Roslaili bt Abdul Ghani & Anor v Ahmad Azman bin Yaacob*.³² In these cases, the court granted reasonable access without specifying the term of access. The purpose of granting reasonable access is to allow the parents to set up their own arrangements according to the needs and interests of the children.

In a recent unreported case of *Abdul Malek Mohamed Said and Arlin Nasaruddin*³³, the Syariah court make an interim order of shared parenting to both parents pending a fresh application for custody by the mother. Despite the fact that the order is an interim order, it may be concluded that the order for shared parenting is feasible if it is proven that shared parenting is in the best interest of the child. As such, legislation that imposes both parents continuous involvement with their child after separation or divorce like shared parenting or shared parental responsibility should be encouraged and practiced in the Shariah court in correspond to the classical law principle.

4.3 Circumstances where Equal Shared Parenting Are Not In the Best Interest of the Child

Research has shown that shared parenting will not be the best consideration in child custody determination if both parents involve in ongoing conflict even after divorce. Accordingly, the conflict has especially detrimental effects on the child and that child is particularly at risk when he or she has frequent and continuing access to both parents who are hostile and uncooperative with each other.³⁴ One of the factors which contribute to the ongoing parental conflict is domestic violence. It is a fact that the communication and cooperation that help to ensure the success of shared parenting are not found in a domestically violent relationship. Batterers usually have not demonstrated an ability to cooperate and compromise with their victim when they have continually attempted to control the victim's action.³⁵ In some cases, the batterer likely will use the children to serve his or her best interests by using them as a tool against the victim. Consequently, the child will continue to be exposed to conflict, abuse and strife between the parents, all of which have been proven detrimental to the children's development.³⁶

²⁸(1998) 8 JH 247.

²⁹(1981) 1 JH 102.

³⁰(2001) xiv JH 179.

³¹(2002) xv JH 25.

³²(1427H) XXI JH (I) 101.

³³ MyMetro, http://www.hmetro.com.my/myMetro/articles/Pasangandiarahjagaanaksecarabergilir/Article/art_print.

³⁴ Judith S. Wallerstien & Janet R. Johnston, Children of Divorce: Recent Findings Regarding Long-Term Effects and Recent Studies of Joint and Sole Custody, 11 *Pediatrics in Rev.* (1990) at 203.

³⁵ See David Adams, *Treatment Models of Men Who Batter: A Profeminist Analysis*, in *Feminist Perspective on Wife Abuse* 176, at 191-192, as cited in D. Lee Khachturian, Domestic Violence & Shared Parental Responsibility: Dangerous Bedfellows, (1999) *Wayne L. Rev.* 1768.

³⁶ D. Lee Khachturian, *ibid*.

The Malaysian courts similarly considered that the factor of ongoing conflicts between divorced parents would defeat the order of shared parenting as it would be detrimental to the child's development and does not serve the best interest of the child. For instance in *Sivajothi K. Suppiah v Kunathasan Chelliah*,³⁷ the court held that order of shared parenting was inappropriate since there was a history of persistence violence between the parents which subsequently led to infliction of injuries to the other party.³⁸

Conversion of one parent to another religion has also contributed to ongoing conflict between the divorced parents and this would again defeat the consideration of shared parenting in custody determination. In Malaysia, conversion to Islam by of one of the spouse is a ground for divorce under the LRA 1976.³⁹ When one of the parent converts to Islam, the other parent may petition for divorce and accordingly, the determination of the religion of the child will be the main focus. It has been clearly stated in the Federal Constitution that the religion of a person under the age of eighteen shall be decided by his or her parent or guardian.⁴⁰ As such, both parents will obviously want to exercise their rights as parents to determine their child's religion. In *Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah*,⁴¹ the High Court had to resolve the battle for custodial rights between parents when the father converted to Islam. The two children aged four and two years were converted to Islam few days after the father's conversion. Legal custody was given to both parents with physical care and control given to the mother as the children were still below the age of seven at the time of the proceedings. The right of religious practice of the two infant children was to be exercised equally by the mother and father. However, the court reminded that the non-convert mother would lose the right to actual custody if there were reasonable ground to believe that she would influence the children's religious beliefs, for instance, teaching them her article of faith. When the children reached the age of discernment they would have the choice of living with either of the parents unless the court otherwise ordered.⁴² Nevertheless the order was not adhered to by the mother as she was reported to have been absconded with the children. This case proves that order of shared parenting is not the best consideration in child custody disputes involving conversion of one parent to another religion as it entails ongoing parental conflicts in determining the custody and religious upbringing of the child.

The order of shared parenting is also inappropriate in cases where the divorced parents are living separately in two different countries. As being discussed in the above case of *Foo Kok Soon v Leony Rosalina*,⁴³ the court's initial order for joint custody, care and control of the two children was later changed with the consent of both parents because of the difficulty in enforcing the order as the mother had moved to Australia.

From the above discussions, it may be concluded that despite the absence of a clear provision on the concept of equal shared parenting or equal shared parental responsibility in the Malaysian legislations, the Civil and Shariah courts substantially acknowledge the application

³⁷ [2000] 3 CLJ 175.

³⁸ Ibid, at 193.

³⁹ See section 51 of LRA 1976

⁴⁰ See Article 12(4) Federal Constitution

⁴¹ [2004] 3 CLJ 516.

⁴² Ibid, at 533.

⁴³ See note 24

for equal shared parenting or shared parental responsibility provided that there is no serious ongoing parental conflict between the divorced parents and they are willing to cooperate and compromise in managing the child's upbringing.

Australian Experience

Australia enacted its shared parenting legislation in 1996 following similar changes in the United Kingdom in 1991.⁴⁴ A key aim of the legislation was to emphasise “the joint responsibilities” of separated parents for their children's care. The Australian Family Law Act 1975 (as amended 2008) does not actually use the term shared parenting, but incorporate a rebuttable presumption of shared parental responsibility. The Act, inter alia, provides that the children have the right to know, and to be cared by both of their parents no matter whether they are still married or already separated, and the parents are to share duties and responsibilities concerning the care, welfare and development of their children, provided it is not contrary to the best interests of the child.⁴⁵ The idea of shared parenting is firstly promoted in the former FLA under the concept of shared parental responsibility.⁴⁶ The concept promotes the idea of both parents being actively involved in their children's lives following their separation and regardless of their previous marital status.⁴⁷ But this was criticized for the lack of content and direction on how it should be exercised,⁴⁸ in which case may further lead to parental conflicts.⁴⁹ The imprecision of the parental responsibility and parenting arrangements' provisions in the FLA finally led to its amendment,⁵⁰ being substituted by the Family Law Amendment (Shared Parental Responsibility) Act 2006.⁵¹

⁴⁴ See Helen Rhoades, *The Rise and Rise of Shared Parenting Laws: A Critical Reflection*, (2002) 19 *Can. J. Fam. L.*, 76

⁴⁵ See section 60B(2)(a) & (c) of the FLA.

⁴⁶ See section 61C(2) of the FLA.

⁴⁷ The recommendation for shared parental responsibility was made by the Family Law Council in its report titled, ‘Patterns of Parenting After Separation, 1992. See Geoff Monahan & Lisa Young, n. 48, at 207. See also, Eva Ryrstedt, “Joint Decisions: A Prerequisite or a Drawback in Joint Parental Responsibility?”, vol. 17, (2003) *AJFL*, 1-152, at 30.

⁴⁸ The former FLA 1995 provides no clear definition of shared parenting, nor the indication of the extent to which it intended separated parents to make shared residence arrangements for their children. There is also uncertainty about how parents should exercise their parental responsibility after the separation; whether they may act independently or must consult with each other before making a decision. See H. Rhodes, R. Greycar and M. Harisson, *The Family Reform Act 1995: The First Three Years*, <http://www.family.court.gov.au/papers/pdf/famlaw.pdf>, (assessed on 5th July 2004).

⁴⁹ In some cases, the courts have interpreted that shared parental responsibility only involve matters relating to major issues affecting the children such as determination of religion, place of education and decision relating to their health. See for example *B and B: Family Law Reform Act 1995* (1997) 21 *Fam. L.R.* 676.

⁵⁰ The reform was based on the recommendation made by the House of Representative Standing Committee on Family and Community Services in their 2003 report on parenting arrangements following separation titled ‘Every Picture Tell a Story’. See Geoff Monahan & Lisa Young, n.48, at 340.

⁵¹ The current Australian Family Law Act is the Family Law Act 1975 (amended 2008) (hereinafter referred to as the FLA).

The amendment inter alia introduces a new provision on a rebuttable presumption which favour equal shared parental responsibility⁵² in making parenting orders.⁵³ It was pointed out that the court, when making a parenting order, must apply a presumption that it is in the best interests of the child for the parents to have equal shared parental responsibility,⁵⁴ except there are reasonable grounds asserts that one of the parent has been engaged in family violence or child abuse.⁵⁵ When there is an order for equal parental responsibility, both parents are required to jointly make decisions about long-term issues in relation to their child, like their education, religious and cultural upbringing.⁵⁶

It is stated in the note of the new provision of the FLA (as amended 2008) that the rebuttable presumption is related only to allocation of parental responsibility and does not deal with the amount of time the child should spends with each parent.⁵⁷ Nevertheless, the issue of the amount of time spent must be considered by the court when it wanted to make a parenting order that provides equal parental responsibility for the child.⁵⁸ The provision of the Act further provides that the court must consider whether spending equal time with each of the parents would be in the best interests of the child and reasonably practical. If it is so, then the court must consider making an order for equal time. When the equal time is not appropriate, the court must consider making an order for substantial and significant time with parents; this is subject to the same rule of the child's best interests and reasonability of its practicality.⁵⁹

The procedures for the application of the presumption of equal shared parental responsibility as laid down in the new FLA (amended 2008) have been fully adopted by judges in parenting order cases such as *Goode v Goode*,⁶⁰ *Waring & Boswell*,⁶¹ *D & C*⁶² and *Spain & Spain*.⁶³ These cases stress the importance of the best interests of the child when considering the application of the presumption of equal shared parental responsibility in parenting order. For

⁵² The report initially recommend for a direct inclusion of a rebuttable presumption in favour of shared physical custody that is equal parenting time. However, it was rejected by the Australian government as it was difficult to practically determine the significant time spend by the child with each parent. See the 2004 government Discussion Paper titled, *A New Approach to the Family Law System, Implementation of Reforms, Discussion Paper*, Australian Government, November 2004, Canberra, <<http://www.familylaw.gov.au/presence/resources.pdf>> (accessed 17 February 2008).

⁵³ See section 61DA of the FLA. Parenting orders which is defined in section 64B(1) & (2), are orders relating to the residence and contact of a child, and special purpose order which the court considered necessary for the upbringing of the child.

⁵⁴ See the analysis of the Department of Parliamentary Services, Parliament of Australia on the Family Law Amendment (Shared Parental Responsibility) Bill 2005, 28 February 2006, no. 99, <<http://www.aph.gov.au/librarypubs/bd/2005-06.pdf>> (assessed 17 February 2008)

⁵⁵ The provision for protection of children against violence, abuse and neglect is another new provision introduced in the reform. See section 61DA(2) of the FLA (amended 2008). Other reform of the Act includes encouraging people to resolve disputes between themselves and making the court process less adversarial. See Richard Chisholm, "Making it Work: The Family Law Amendment (Shared Parental Responsibility) Act 2006", Vol. 21, (2007), *AJFL*, at 2.

⁵⁶ See item 4, subsection 4(1) of the FLA.

⁵⁷ See the note to section 61DA of the FLA.

⁵⁸ See section 65DAA(1) of the FLA.

⁵⁹ See section 65DAA(1) & (2) of the FLA.

⁶⁰ [2006] FamCA 1346.

⁶¹ [2007] FamCA 597.

⁶² [2007] FMCA fam 329.

⁶³ [2007] FamCA 883.

instance, in *Spain v Spain*, the court granted an order of equal shared responsibility as it viewed that it would be for the best interests of the child. This is in spite of the fact that there was a high conflict between the parents regarding the prior parenting arrangements. In *Waring & Boswell*, the court granted equal shared responsibility to the parents and considered that the spending of equal amount of time with the each parent is reasonably practical and could serve the child's best interests, because the father lived in reasonable proximity with the mother who had cared for the child since the parents' separation. Meanwhile *Goode v Goode* provides a detailed discussion on the process of the application of the presumption and considers that the determination of the equal amount of time that the child must spend with each parent is necessarily limited to cases where the parents must reasonably live in proximity or has the capacity to implement the arrangements under consideration or having the current and future capacity to communicate and resolve difficulties.⁶⁴ The court may still make the order in spite of the absence of the above conditions if such arrangements can promote the child's best interests.

The above discussions has shown that the concept of shared parenting in the Australian Family Law legislation has undergone a tremendous shift and had fully receive judicial support after the recent amendment to the FLA. These positive developments are based on the fundamental idea that parents are forever despite the parental separation in order to ensure that the best interests of the child is served.

Conclusion

In regards to the concept of shared parenting, it appears that Malaysia and Australian laws do not used the language of shared parenting but generally incorporate the idea of shared parental responsibility, where parental responsibilities towards children are to be commonly shared by both parents even after separation or divorce. The Australian law was amended in 2006 to expressly include a rebuttable presumption in favour of equal shared parental responsibility in the upbringing of the child. It also includes shared physical custody in relation to making parenting orders. The Malaysian law only provides for equal parental rights in guardianship matters and does not include shared parenting in the physical custody, cares and control of the child. Despite of its absence in the Malaysia's legislations, the courts may discretionarily make a similar order so long as it complies with the principle that it is in the best interests of the child and reasonably practical to be executed. Apparently, all cases dealt within these jurisdictions agree with the factors that the court must take into account in determining whether or not joint physical custody is practicable. These factors include the parents are not in continuous conflict and do not lead to harm and violence, and the impact of such arrangement would be beneficial to the child.

⁶⁴ According to a research finding on shared parenting by the Australian Institute of Family Studies, a number of conditions appear necessary to make shared parenting a viable option for separated parents. These conditions include, geographical proximity, the ability of parents to get along in terms of a business-like working relationship as parents, the arrangement must be child-focused arrangement, with the child 's activities forming integral part of the way in which the parenting schedule is developed, and a commitment by everyone to make shared care work. See Bruce Smyth, Catherine Caruana & Anna Ferro, "Some Whens, Hows and Whys of Shared Care: What Separated Parents Who Spend Equal Time With Their Children Say About Shared Parenting", Australian Institute of Family Studies, paper presented at the *Australian Social Policy Conference 2003*, Sydney Australia, 9-11th July, <<http://www.aph.gov.au/institute/pubs/fm2003/fm65/bs.pdf>> (assessed 17th. February 2008).

